

these licenses by random selection procedures.⁹⁶ On the facts before us, we tentatively conclude that the public interest would best be served by using competitive bidding to award the applications for licenses in the 932/941 MHz bands, and we seek comment on this tentative conclusion. We also propose to dismiss without prejudice the pending license applications for the 932/941 MHz bands.

53. In granting the Commission authority to award licenses by auction, Congress specified in Section 309(j), as quoted above, a series of strong public policy reasons supporting the use of auctions. Further, we have designed our auction methodologies to award the licenses rapidly, facilitate the efficient aggregation of licenses, avoid excessive implementation costs and complexity, and award licenses to the parties that value them most highly.⁹⁷ Based on our experience, competitive bidding is an extremely efficient method of assuring, with a minimum of regulatory burden, that radio licenses are assigned to those applicants with the greatest desire for the spectrum. The use of lotteries, on the other hand, does not further the public policy goals described above, and in fact has been found to create its own set of problems, such as speculative conduct and a resultant delay in service to the public.

54. Twice in the past, in the context of other services, we have addressed this issue and found that the public interest would best be served by the use of lotteries.⁹⁸ In the first instance, approximately 10,900 applications for Cellular Radio Service unserved areas were filed for an available 146 licenses.⁹⁹ In the second instance, approximately 100 Multiple Distribution Service (MDS) applications were filed for five available licenses.¹⁰⁰ Our decisions reflected Congressional recognition that equitable considerations and administrative costs may, in some instances, justify the use of lotteries despite the public benefits now recognized to be associated with the use of competitive bidding. Upon balancing the factors on both sides of the issue, we found that the public interest was, in those instances, best served by the use of lotteries.

⁹⁶ Because the applications were filed prior to July 26, 1993, they fall under the "Special Rule" of Section 6002(e) of the Omnibus Budget Reconciliation Act of 1993. See 47 U.S.C. §§ 309(i) and (j); Budget Act, Pub. L. No. 103-66, § 6002(e) (Special Rule), 107 Stat. 312, 397 (1993).

⁹⁷ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2360-61; see also *supra* para. 44.

⁹⁸ In the case of one additional service, the Interactive Video and Data Service (IVDS), Congress explicitly singled out the service and its pending applications as an instance in which the Commission could choose to award licenses by lottery. See H.R. Rep. No. 213, 103d Cong., 1st Sess. 498 (1993). In light of this, we subsequently held a lottery for the pending IVDS applications, but did not in that context address the present issue at length. See *Notice of Proposed Rule Making*, 8 FCC Rcd at 7659; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2357.

⁹⁹ *Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7387 (1994).

¹⁰⁰ *Report and Order*, MM Docket No. 94-131, PP Docket No. 93-253, 10 FCC Rcd 9589, 9630-34 (1995).

55. On balance, we tentatively conclude that the factors before us favor resolving the pending mutually exclusive MAS applications through competitive bidding. First, given the large number of pending applications and potential markets, the use of a lottery would result in greater processing costs and a delay in service, when compared to use of an auction. By contrast, in the MDS context, there were relatively few applications and licenses at issue,¹⁰¹ and a fifth of the number pending in the cellular unserved context. Thus, in the context of MAS, we believe the use of auctions would considerably reduce administrative costs, further efficient licensing, and expedite service the public.

56. Second, based on the fact that we are proposing significant changes to the MAS service rules, we believe that processing the previously filed applications would be inconsistent with our proposed licensing approach for MAS. As noted, for instance, we are proposing to change from a site-by-site licensing approach to a geographic area licensing plan, facilitating wide-area operation and permitting a wider array of services to be provided by MAS licensees. We are also proposing to allow geographic area licensees to provide mobile and fixed operations on a co-primary basis with point-to-multipoint operations. Thus, it appears that the pending applicants would in any case need to substantially rethink their initial plans. This is in contrast to the cellular unserved and MDS services, where we made no changes to the types of services that could be offered by licensees or any other significant changes to the service rules between the time that the applications were filed and the lotteries were held.

57. We concede that the 50,000 applications have, much like cellular unserved, been on file for several years. Significantly, however, these applicants had ample opportunity to carry out their business plans with little additional expenditure by applying for other MAS channels. In this respect, we note that throughout the period the 50,000 MAS applications have been pending, spectrum was available that is substitutable in every respect. In contrast, the pending cellular unserved and MDS applicants had no alternative spectrum for pursuing their business plans. The public interest is, we tentatively conclude, best served by applying the new rules to both previous and new applicants.

58. We recognize that the tentative decision to use competitive bidding for these licenses will be contrary to the expectations of those applicants who, in good faith, expected to participate in a lottery and, if successful, provide MAS service. We nonetheless tentatively conclude that this factor, while significant, does not offset the strong public interest factors favoring the use of auctions. We seek comment on our proposal and tentative conclusions.

3. Competitive Bidding Provisions

59. We anticipate conducting the auction for MAS frequencies in conformity with the general competitive bidding rules in Part 1, Subpart Q of the Commission's Rules, and

¹⁰¹ *Report and Order*, 10 FCC Rcd at 9630 n.56, 9631.

substantially consistent with the auctions that have been employed in other wireless services.¹⁰² We propose to adopt the simultaneous multiple round competitive bidding design used in the PCS auctions for the MAS auction. Multiple round bidding should provide more information to bidders than single round bidding during the auction about the values of the licenses. We seek comment on this proposal. We also tentatively conclude that the MAS auction will follow the general competitive bidding procedures of Part 1, Subpart Q. We seek comment on this tentative conclusion.

60. *Small Business.* In the *Second Memorandum Opinion and Order* in the competitive bidding docket, we indicated that we would establish definitions for "small business" on a service-by-service basis.¹⁰³ Commenters should discuss the level of capital commitment that is likely to be required to purchase an MAS license at auction and create a viable business. Our goal, should we adopt a definition and associated special provision(s) for small businesses, will be to ensure the participation of small businesses in the auction and in the provision of service. Thus, we seek comment regarding the establishment of a "small business" definition for MAS.

61. We note that small business provisions offered in other services include installment payment plans and bidding credits. We seek comment on what small business provisions should be offered to MAS small business licensees and what terms should be offered. In other services we also adopted different attribution rules for purposes of determining small business status. We tentatively conclude that for MAS we will attribute the gross revenues of all controlling principals in the small business applicant as well as its affiliates. We seek comment on this tentative conclusion.

62. We also seek comment on whether small business provisions are sufficient to promote participation by businesses owned by minorities, women, or rural telephone companies. To the extent that commenters propose additional provisions to ensure participation by minority-owned or women-owned businesses, we also invite them to address how such provisions should be crafted to meet the relevant standards of judicial review.¹⁰⁴

63. *Partitioning and Disaggregation.* We also seek comment on the type of unjust enrichment requirements that should be placed as a condition for approval of an application for

¹⁰² The Commission makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC licensee in this service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular services, technologies or products, nor does an FCC license constitute a guarantee of business success. Applicants should perform their individual due diligence before proceeding as they would with any new business venture.

¹⁰³ *Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC 7245, 7268-69 (1994).

¹⁰⁴ See *Adarand Constructors v. Peña*, 115 S.Ct. 2097 (1995) and *United States v. Virginia*, 166 S.Ct. 2264 (1996).

a partial transfer (either by partitioning or disaggregation) of a license owned by, *e.g.*, a qualified small business to a non-small business. We tentatively conclude that these unjust enrichment provisions would include accelerated payment of any bidding credit that we may adopt for small businesses, unpaid principal, and accrued unpaid interest, and would be applied on a proportional basis. We seek comment on this tentative conclusion. We also seek comment on how such unjust enrichment amounts should be calculated, especially in light of the difficulty of devising a methodology or formula that will differentiate the relative value of the partitioned areas and the amount of spectrum disaggregated. We propose to use population as the objective measure to calculate the relative value of the partitioned area and the amount of spectrum disaggregated as the objective measure for disaggregation, and we seek comment on this proposal. Finally, in the event that restrictions are placed on the assignment or transfer of "complete" MAS licenses awarded pursuant to special provisions, should we similarly restrict the partitioning of such licenses when the partitionee is not within the definition of an entity eligible for such special provisions? At some point (*e.g.*, a term of years), should such restriction be removed and the unjust enrichment provisions apply on a proportional basis?

64. In the event that we determine that special provisions for small businesses are appropriate for MAS auctions, we tentatively conclude that if we permit a qualified small business licensee to partition or disaggregate to a non-small business entity, the partitioning or disaggregating licensee should be required to repay any benefits it received from the small business special provisions on a proportional basis. This would include accelerated payment of bidding credits, unpaid principal, and accrued unpaid interest. We seek comment on this tentative conclusion. To the extent that we adopt installment payment financing for MAS, we seek comment on how to adjust installment payments owed by partitioning and disaggregating licensees. For example, should a small business licensee that partitions or disaggregates to another small business be required to repay, on an accelerated basis, a portion of the outstanding principal balance owed under an installment payment plan? We seek comment on how this should be calculated. If we do not require payment of any amount of the outstanding principal balance for a license obtained by a small business as a condition for approval of the partitioning or disaggregation application, what other alternative conditions could we impose to ensure that the partitioning licensee continues to meet its financial obligation to the United States Government? We seek comment on whether the partitionee or disaggregatee should be required to guarantee payment of a portion of the obligation incurred by the partitioner or disaggregator (the original licensee). Similarly, in the event that we adopt bidding credits for MAS auctions, we tentatively conclude that if a small business licensee partitions or disaggregates to another qualified small business that would not qualify for the same level of bidding credit as the disaggregating licensee, the disaggregating licensee should be required to repay a portion of the benefit it received. We seek comment on how that amount should be calculated.

D. Frequency Set-Aside for Governmental and Public Safety Entities

65. As noted above, we are proposing to use competitive bidding to award licenses in the 932/941 MHz bands. These bands, however, are currently available for both Federal

governmental and non-governmental, including public safety, use. Federal governmental and public safety services are exempt from competitive bidding procedures.¹⁰⁵ Furthermore, concerning public safety use, we have long recognized that this community of users has certain unique characteristics that distinguish it from other users of the electromagnetic spectrum.¹⁰⁶ Along these lines, in the Final Report of the Public Safety Wireless Advisory Committee (PSWAC), it was stated that "wireless communications systems are critical to Public Safety agencies' ability to protect lives and property and the welfare of Public Safety officials."¹⁰⁷ The *PSWAC Final Report* further states that currently allocated public safety spectrum is inadequate to meet the public safety community's current voice and data needs.¹⁰⁸ As part of its recommendations and observations concerning how the public safety community's immediate and future needs can be met, PSWAC's Steering Committee stated that:

More flexible licensing policies are desirable. The current approach, focused primarily on continuous narrow banding, does not provide the Public Safety community the flexibility of selecting or obtaining the most efficient technology to meet user-defined needs. Policies should encourage the use of the most spectrally efficient approaches while remaining technology neutral.

More sharing and joint use should be encouraged. Some states and regions are experiencing considerable success in pooling spectral and other resources. In many instances, perceived losses in terms of independence of operation are more than offset by improvements in function and efficiency. Policies designed to streamline cooperative use of federal and non-federal spectrum should be adopted.¹⁰⁹

66. Therefore, we propose to set aside five (5) of the forty (40) channel pairs in the 932/941 MHz band exclusively for Federal governmental and public safety operations.¹¹⁰ While

¹⁰⁵ See, e.g., *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2352 (Public Safety Services). However, when spectrum is subject to competitive bidding procedures, Federal Governmental and Public Safety entities that are otherwise qualified under the rules may participate in the auction and purchase licenses.

¹⁰⁶ See, e.g., Report and Plan for Meeting State and Local Government Public Safety Agency Needs Through the Year 2010, *Report and Plan*, FCC 95-55, adopted Feb 9, 1995, released Feb 9, 1995. See also The Development of Operational, Technical, and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010, *Notice of Proposed Rule Making*, WT Docket No. 96-86, cite.

¹⁰⁷ Final Report of the Public Safety Wireless Advisory Committee to the Federal Communications Commission and The National Telecommunications and Information Administration (Sept. 11, 1996), Volume 1, at 1 (*PSWAC Final Report*).

¹⁰⁸ *Id.* at 19.

¹⁰⁹ *Id.* at 3.

¹¹⁰ Public Safety would be defined as any person or governmental entity eligible for licensing under 47 C.F.R. Part 90, Subpart B.

the *PSWAC Final Report* did not specify MAS spectrum for a potential new public safety allocation, we believe that this spectrum is feasible for accommodating some of the public safety community's growing demand for narrowband data and paging applications.¹¹¹ We also consider this Federal governmental and public safety channel set aside proposal to be a first step towards establishing a policy streamlining cooperative use of Federal and non-Federal spectrum. We seek comment on this proposal.

67. With respect to our licensing approach for these five channel pairs, we take note of PSWAC's request for more flexible licensing policies in the public safety context. As a result, we propose that these channels be available on a first come, first served basis, with licensees having the technical flexibility to offer a variety of services, including point-to-point, point-to-multipoint, fixed, and mobile. We further propose that coordination of operations on these frequencies be accomplished through IRAC using the mileage separation criteria in Part 101 of our rules. In the event of mutually exclusive applications, we propose to use random selection procedures to assign the channels. We seek comment on these proposals. In addition, we ask for comments of whether we should (1) make some of the 5 channel pairs available primarily to either public safety or the Federal government rather than co-primary as proposed, and (2) establish a cutoff date for terminating this set-aside (e.g., make some or all of the 5 channel pairs generally available if they are not used by public safety/Federal government after five years). We also ask commenters on this issue to support their positions, where possible, with data demonstrating the current and projected needs for Federal governmental and public safety licensees. If the above level of proposed spectrum set aside is inadequate or too large, what level would be adequate?

E. Suspension of Acceptance and Processing of Applications

68. In light of our actions described above, and effective as of the date of the adoption of this *Notice*, we will temporarily suspend acceptance of MAS applications for new licenses, amendments, or modifications for the 932/941 MHz bands, the 928/959 MHz bands, and applications to provide subscriber-based service in the 928/952/956 MHz bands, except as provided below. The suspension is effective until further notice and applies to applications received on or after the date of the adoption of this *Notice*. Any such applications received after that deadline will be returned as unacceptable for filing. We take this action to permit the orderly and effective resolution of the issues in this proceeding. Absent this action, applications for new licenses, amendments, and modifications might limit the effectiveness of the decisions made and the standards developed in this proceeding. We note that this action is consistent with the approach we have taken in all other existing services where we have proposed to adopt geographic area licensing and auction rules.¹¹² We therefore find that this temporary measure is in the public interest. This suspension, however, does not affect applications for MAS licenses

¹¹¹ See *PSWAC Final Report* at 42-43, 56.

¹¹² See, e.g., *Paging Notice* at ¶ 139 & n.270.

for private, internal communications (Part 101), in the 928/952/956 MHz bands based on our tentative conclusion to designate these bands exclusively for private use.

69. Notwithstanding this temporary suspension, we will continue to process all MAS applications for minor modifications¹¹³ or for license assignment or transfer of control. This exception will also apply to amendments to applications for minor modifications. This exception should permit modifications that can improve the efficiency of incumbent MAS operations without affecting the effective and orderly resolution of the issues in this proceeding. Again, we will continue to accept applications for minor modifications, license assignments, and transfers of control under existing procedures.

70. With respect to MAS applications for new licenses, amendments, or non-minor modifications which were filed prior to the deadline stated above and remain pending, we will process such applications provided that (1) they are not mutually exclusive with other applications as of the deadline stated above, and (2) the relevant period for filing competing applications has expired as of the deadline stated above. We believe that this approach gives the appropriate consideration to those applicants who filed applications prior to our proposed changes and whose applications are not subject to competing applications. Previously filed applications not meeting the above criteria will be held in abeyance until the conclusion of this proceeding. We will determine later, in accordance with such new rules as are adopted, whether to process or return any such pending applications.

71. These decisions are procedural in nature and therefore not subject to the notice and comment and effective date requirements of the Administrative Procedure Act.¹¹⁴ Moreover, there is good cause for proceeding in this manner: to do otherwise would be impractical, unnecessary, and contrary to the public interest because compliance would undercut the purposes of these interim measures.¹¹⁵

V. CONCLUSION

72. In this *Notice* we propose, *inter alia*, to (1) convert licensing of MAS spectrum for which the principal use will involve, or is reasonably likely to involve, "subscriber-based" services, from site-by-site licensing to geographic area licensing, (2) simplify and streamline the MAS licensing procedures and rules, (3) increase licensee flexibility to provide communication services that are responsive to dynamic market demands, and (4) employ competitive bidding procedures to resolve mutually exclusive applications for MAS spectrum for which the principal use will involve, or is reasonably likely to involve, "subscriber-based" services. In addition, we temporarily suspend the acceptance and processing of MAS applications, except as provided

¹¹³ See 47 C.F.R. §§ 101.59, 101.61.

¹¹⁴ See 5 U.S.C. §§ 553(b)(A), (d); *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963).

¹¹⁵ See 5 U.S.C. §§ 553(b)(B), (d)(3).

herein. This suspension is effective as of the date of the adoption of this *Notice*. These actions are intended to establish a flexible regulatory framework for MAS that will, among other things, provide opportunities for continued development of competitive new service offerings by allowing flexible use of the spectrum, expedite market entry through streamlined licensing procedures, and promote technological innovation by eliminating unnecessary regulatory burdens.

VI. PROCEDURAL MATTERS

A. *Ex Parte* Rules -- Non-Restricted Proceeding

73. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

B. Initial Regulatory Flexibility Analysis

74. With respect to this present *Notice*, an Initial Regulatory Flexibility Analysis (IRFA), see generally 5 U.S.C. § 603, is contained in Appendix A. The IRFA addresses the expected impact on small entities of the proposals made in this document, and requests written comments on these proposals. To fulfill the mandate of the Contract with America Advancement Act of 1996 (Pub. L. No. 104-121, 110 Stat. 847 (1996)) regarding the subsequent Final Regulatory Flexibility Analysis in this proceeding, we ask a number of questions in the IRFA regarding the prevalence of small businesses in the Multiple Address Systems industry. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments regarding this *Notice*, and must have a separate and distinct heading designating them as responses to the IRFA. The Secretary shall send a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

C. Initial Paperwork Reduction Act of 1995 Analysis

75. This *Notice* contains a proposed information collection. As part of the Commission's continuing effort to reduce paperwork burdens, we invite the general public, the Office of Management and Budget (OMB), and other agencies to take this opportunity to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Notice*; OMB comments are due 60 days after the publication of this *Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of

information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to *both* of the following: Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov, and Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 -- 17th Street, N.W., Washington, D.C. 20503, or via the Internet to fain_t@al.eop.gov. For additional information regarding the information collections contained herein, contact Dorothy Conway, above.

D. Comment Dates

76. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before April 21, 1997, and reply comments on or before May 6, 1997. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You must send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. You may also file informal comments by electronic mail. You should address informal comments to bjames@fcc.gov. You must put the docket number of the proceeding on the subject line ("WT Docket No. 97-81"). You must also include your full name and Postal Service mailing address in the text of the message. Formal and informal comments and reply comments will be available for public inspection during regular business hours in the F.C.C. Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, DC 20554.

77. For further information, contact Bob James, Private Wireless Division, Wireless Telecommunications Bureau, at (202) 418-0680.

VII. ORDERING CLAUSES

78. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j).

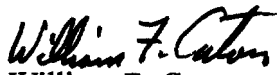
79. Accordingly, IT IS ORDERED that, effective as of the date of the adoption of this *Notice of Proposed Rule Making*, NO NEW APPLICATIONS WILL BE ACCEPTED FOR FILING in the 932-932.5/941-941.5 MHz bands and the 928.85-929/959.85-960 MHz bands, and NO NEW APPLICATIONS WILL BE ACCEPTED FOR FILING for subscriber-based service in the 928-928.85/952-952.85 MHz bands and the 956.25-956.45 MHz band, except applications for minor modifications or for license assignment or transfer of control.

80. IT IS FURTHER ORDERED that pending applications for licenses in the 928.85-929/959.85-960 MHz bands, 928-928.85/952-952.85 MHz bands, and the 956.25-956.45 MHz band WILL BE PROCESSED provided that (1) they are not mutually exclusive with other

applications as of the date and time of the adoption of this *Notice of Proposed Rule Making*, and (2) the relevant period for filing competing applications has expired as of the date of the adoption of this *Notice of Proposed Rule Making*. Pending applications not meeting these criteria, except applications for private, internal communications in the 928-928.85/952-952.85 MHz bands and the 956.25-956.45 MHz band, WILL BE HELD IN ABEYANCE until the conclusion of this proceeding. We will determine later, in accordance with such new rules as are adopted, whether to process or return any such pending applications.

81. The interim measures described will continue until the Commission announces that the acceptance of the subject applications and the processing of applications held in abeyance (if such is determined) will resume. This action is authorized under Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r).

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS
Regulatory Flexibility Act

1. Pursuant to the Regulatory Flexibility Act (RFA), *see* 5 U.S.C. § 603, the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in this *Notice of Proposed Rule Making (Notice)*. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice*, as described *supra* in section VI. The Secretary shall cause a copy of this *Notice* to be sent to the Chief counsel for Advocacy of the Small Business Administration, in accordance with 5 U.S.C. § 603(a).

A. Reason for Action:

2. This *Notice* requests public comment on our proposals to maximize the use of spectrum allocated to Multiple Address Systems in the Microwave Service. These proposals include: (1) converting licensing of MAS spectrum for which the principal use will involve, or is reasonably likely to involve, "subscriber-based" services, from site-by-site licensing to geographic area licensing, (2) simplifying and streamlining the MAS licensing procedures and rules, (3) increasing licensee flexibility to provide communication services that are responsive to dynamic market demands, and (4) employing competitive bidding procedures (auctions) to resolve mutually exclusive applications for MAS spectrum for which the principal use will involve, or is reasonably likely to involve, "subscriber-based" services. In addition, by this *Notice* we temporarily suspend the acceptance and processing of MAS applications, with the exception of applications in a few noted categories.

B. Objectives:

3. In attempting to maximize the use of MAS spectrum, we continue our efforts to establish a flexible regulatory framework for spectrum allocations that will, among other things, provide opportunities for continued development of competitive new service offerings by allowing flexible use of spectrum, expedite market entry through modified licensing procedures, and promote technological innovation by eliminating unnecessary regulatory burdens.

C. Legal Basis:

4. The authority for this action is contained in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j). *See also* Administrative Procedure Act, 5 U.S.C. § 553.

D. Description and Estimate of Small Entities Affected:

5. Pursuant to the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996),¹¹⁶ the Commission is required to estimate in its Final Regulatory Flexibility Analysis the number of small entities to which a rule will apply, provide a description of such entities, and assess the impact of the rule on such entities. The Regulatory Flexibility Act defines a "small business" to be the same as a "small business concern" under the Small Business Act unless the Commission has developed one or more definitions that are appropriate to its activities.¹¹⁷ Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).¹¹⁸ To assist the Commission in this analysis, commenters are requested to provide information regarding how many MAS entities, total, would be affected by the various proposals on which the Commission seeks comment in this *Notice*. In particular, we seek estimates of how many affected entities will be considered "small businesses." In this regard, we ask commenters to note that we have requested comment, *supra*, regarding the establishment of a small business definition for MAS for the purpose of competitive bidding.

6. The proposals in the *Notice* would effect MAS licensees and applicants for licenses. Such entities fall into two categories: (1) those using MAS spectrum for which the principal use involves, will involve, or is reasonably likely to involve, "subscriber-based" (commercial) services, and (2) those using, or intending to use, MAS spectrum to provide for their own internal communications needs. Theoretically, it is also possible that an entity could fall into both categories. The spectrum uses in the two categories differ markedly.

7. With respect to the first category, neither the Commission nor the Small Business Administration (SBA) has developed a specific definition of small entities applicable to MAS licensees that provide commercial subscription services. The applicable definition of small entity in this instance appears to be the definition under the SBA rules applicable to establishments engaged in radiotelephone communications. This definition provides that a small entity is any entity employing fewer than 1,500 persons. *See* 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812. The 1992 Census of Transportation, Communications and Utilities, conducted by the Bureau of the Census, which is the most recent information available, shows that only 12 radiotelephone firms out of a total of 1,178 such firms operated during 1992 had 1,000 or more employees. Therefore, whether or not any or all of these 12 firms are MAS

¹¹⁶ Title II of the CWAAA is the "Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), codified at 5 U.S.C. § 601 et seq.

¹¹⁷ *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

¹¹⁸ 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82, 89 (N.D. Ga. 1994).

commercial service providers, nearly all MAS commercial service providers are small businesses by the Small Business Administration's definition. The Commission's licensing database indicates that, as of November 8, 1996, there were a total of 8,171 MAS station authorizations. Of these, 1087 authorizations were for common carrier service.

8. Alternatively, under the SBA rules, the applicable definition of small entity for MAS licensees that provide commercial subscription services may also be applicable to establishments primarily engaged in furnishing telegraph and other message communications. This definition provides that a small entity is an entity with annual receipts of \$5 million or less. *See* 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4822. 1992 Census data, which is the most recent information available, indicates that, of the 286 firms under this category, 247 had annual receipts of \$ 4.999 million or less.¹¹⁹ We seek comment on whether the appropriate definition for such MAS licensees is SIC Code 4812, SIC Code 4822, or both.

9. The Commission seeks comment on the number of small entities that currently provide commercial MAS subscription service, and the number of small entities that would anticipate filing applications to provide such service under the various proposals described in the *Notice*. We seek comment on whether we should conclude, for purposes of the Final Regulatory Flexibility Analysis in this matter, that all MAS commercial communications service providers are small entities.

10. With respect to the second category, which consists of entities that use or seek to use MAS spectrum to provide for their own internal communications needs, we note that MAS serves an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in virtually all U.S. business categories. Because of the array of users, the Commission has not developed (nor would it be possible to develop) a definition of small entities specifically applicable to such MAS users. Nor is there a precise SBA definition. In this context we again seek comment on the whether the appropriate definition of small entity under the SBA rules is that applicable to radiotelephone companies: any entity employing fewer than 1,500 persons. *See* 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812. Again, alternatively, we seek comment on the appropriateness of defining such MAS licensees under SIC Code 4822, concerning establishments primarily engaged in furnishing telegraph or other message communications, or perhaps under both Codes 4812 and 4822. For the purpose of determining whether a licensee is a small business as defined by the Small Business Administration, each licensee would need to be evaluated within its own business area. The Commission's licensing database indicates that, as of November 8, 1996, of the 8,171 total MAS station authorizations, 7,084 authorizations were for private radio service, and of these, 426 were for private mobile service.

¹¹⁹ 1992 Economic Census Industry and Enterprise Receipts Size Report, U.S. Bureau of the Census, U.S. Department of Commerce, Table 2D, SIC Code 4822 (industry data prepared by the Census Bureau under contract to the U.S. SBA Office of Advocacy).

11. We seek comment on the number of small entities that use MAS spectrum for their internal communications needs. Further, we seek comment on the number of small entities that are likely to apply for licenses, under the various proposals described in the *Notice*, to obtain spectrum for their own internal communications needs. Because any entity engaged in a business or commercial activity is eligible to hold an MAS license, the proposals in the *Notice* could prospectively affect any small business in the United States interested in using MAS for its own communications needs. In other words, the universe of prospective or possible MAS users includes all U.S. small businesses.

12. The RFA also includes small governmental entities as a part of the regulatory flexibility analysis.¹²⁰ The definition of a small governmental entity is one with populations of fewer than 50,000.¹²¹ There are 85,006 governmental entities in the nation.¹²² This number includes such entities as states, counties, cities, utility districts and school districts. There are no figures available on what portion of this number has populations of fewer than 50,000. However, this number includes 38,978 counties, cities and towns, and of those, 37,566, or 96 percent, have populations of fewer than 50,000.¹²³ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 96 percent, or 81,600, are small entities that may be affected by our rules.

13. Again, we have requested comment, *supra*, regarding the establishment of a refined small business definition for MAS for the purpose of competitive bidding. This *Notice* does not propose any specific definition, but merely seeks comment on this issue.

E. Reporting, Recordkeeping, and Other Compliance Requirements:

14. If we use competitive bidding to award certain MAS licenses, as proposed, and also establish a small business definition for the purpose of competitive bidding, then all small businesses that choose to participate in these services will be required to demonstrate that they meet the criteria set forth to qualify as small businesses. *See generally* 47 C.F.R. Part 1, Subpart Q (competitive bidding proceedings). Any small business applicant wishing to avail itself of small business provisions will need to make the general financial disclosures necessary to establish that the small business is in fact small.

15. If this occurs, prior to auction each small business applicant will be required to submit an FCC Form 175, OMB Clearance Number 3060-0600. The estimated time for filling

¹²⁰ 5 U.S.C. § 601(5).

¹²¹ *Id.*

¹²² 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

¹²³ *Id.*

out an FCC Form 175 is 45 minutes. In addition to filing an FCC Form 175, each applicant must submit information regarding the ownership of the applicant, any joint venture arrangements or bidding consortia that the applicant has entered into, and financial information which demonstrates that a small business wishing to qualify for installment payments and bidding credits is a small business. Applicants that do not have audited financial statements available will be permitted to certify to the validity of their financial showings. While many small businesses have chosen to employ attorneys prior to filing an application to participate in an auction, the rules are proposed so that a small business working with the information in a bidder information package can file an application on its own. When an applicant wins a license, it will be required to submit an FCC Form 494 (common carrier) or FCC Form 402 (private radio), which will require technical information regarding the applicant's proposals for providing service. This application will require information provided by an engineer who will have knowledge of the system's design. (Also, the Commission is currently developing a single, consolidated MAS form, FCC Form 415, which will eventually supersede both Form 494 and Form 402.)

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposals:

16. None.

G. Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:

17. The *Notice* solicits comment on a variety of proposals, some of which are described below. Any significant alternatives presented in the comments will be considered. As noted, we have requested comment, *supra*, regarding the establishment of a small business definition for MAS. We also seek comment generally on the existence of small entities in MAS and how many total entities, existing and potential, would be affected by the proposed rules in the *Notice*. Finally, we request that each commenter identify whether it is a "small business" under either of the two SBA definitions described *supra* -- either employing fewer than 1500 employees (for radiotelephone communications companies) or having annual receipts of \$5 million or less (for telegraph or other message communications companies).

18. The Commission expects that licensing subscriber-based MAS bands by geographic area, as proposed, will assist small businesses. As described *supra*, such licensing makes expansion of operations easier, and this flexibility assists all licensees, including small business licensees. We also believe that the proposed EA geographic area service area is large enough to support the services contemplated while being small enough to be attractive to small business entities. The *Notice* also proposes a purely private allocation for licenses using MAS solely for internal uses. In addition, the proposed flexible approach to the build-out of MAS systems will assist licensees, including small business licensees, in designing and implementing their particular business plans, while the partitioning and disaggregation proposals will assist those small businesses that might otherwise be unable to acquire a "full" license as currently configured. Finally, we believe that the proposed spectrum auction will assist small entities desiring to obtain MAS licenses. This approach gets licenses to those most likely to use them most effectively.

By contrast, when awarding licenses by lotteries it is only coincidental when the license is awarded to the entity best suited to using the license. Using lotteries, therefore, creates uncertainty for all would-be licensees, including those that are small business. We seek comment on all proposals and alternatives described in the *Notice*, and the impact that such proposals and alternatives might have on small entities.